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IN THE

Supreme Court of the United States

CONAGRA, INC., CONAGRA FOODS, INC., CONAGRA HIDE DIVISION, CONAGRA BEEF COMPANY, and MONFORT, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, *ex rel.* ALI BAHRANI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ALI BAHRANI

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QUESTION PRESENTED

Whether ConAgra avoided an "obligation to pay" money to the government when it created false USDA export records and used those altered documents rather than obtaining, and paying for, officially-issued government documents in accordance with the regulatory process.

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INTRODUCTION

ConAgra's[1] petition boils down not to a circuit conflict, as ConAgra tries to manufacture, but rather simply to a fact-bound dispute unique to this case. As determined by the Tenth Circuit, the applicable regulations regarding the export certificate fees at issue constitute an obligation owed to the United States, but which ConAgra circumvented, and thus, avoided. Fact-bound determinations such as this do not merit the Court's review.

STATEMENT OF THE CASE

The False Claims Act ("FCA") permits private parties to bring suit in federal court against a party that makes or uses false records or statements "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7).[2] The Tenth Circuit applied the clear and unambiguous language of the FCA to the unique facts of this case and the particularized

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1. As noted in ConAgra's Petition for Writ of Certiorari, footnote 1, respondent Bahrani will also use the term "ConAgra" for ease of reference to petitioners.

2. Petitioner misstates the law concerning certain case law holdings and regulatory issues as discussed in detail, *infra*. Additionally, petitioner misstates that the John T. Boese, *Civil False Claims and Qui Tam Actions* (3d ed. 2005) treatise is "the leading treatise on the FCA" (Pet. at 13) because this treatise is wholly defense-oriented in its point of view, and numerous other treatises on the FCA exist each of which are at least equally valid on this topic. *See, e.g.*, James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* (3d ed. 2002); Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* (2004); Joel M. Androphy, *Federal False Claims Act and Qui Tam Litigation* (2005).

United States Department of Agriculture ("USDA") export regulatory framework applicable to animal meats, animal byproducts, and cow hides, and determined that ConAgra avoided a valid and pre-existing regulatory obligation to obtain and pay for official USDA-issued replacement export certificates.

The Tenth Circuit held that ConAgra violated the FCA by making its own changes to official United States Department of Agriculture Export Certificates ("export certificate") without paying the required fee to the government. Rather than follow the prescribed regulatory process to request and pay for an official change to an export certificate, or replacement certificate, ConAgra made its own changes and thereby avoided an obligation to pay the government for the use of official government export certificates. The Tenth Circuit's decision is consistent with both the FCA's purpose and the circuit court opinions addressing the scope of the obligation to pay.

ConAgra slaughters animals for meat, animal byproducts, and cow hides so these products may be sold to third parties nationwide, and in some instances, worldwide. When ConAgra distributes its animal products within the borders of the United States, this requires no USDA export certificate. However, most foreign nations will not allow animal meats, byproducts, and/or cow hides past their borders without an official United States government-issued export certificate.

The USDA maintains strict regulations that control every aspect of its export certification process.[3] The blank certificates must be kept under lock and key; each individual certificate is issued a unique serial number; each certificate must be signed in "other than black ink," and bear the Seal of the USDA; and, if the information on the original government certificate needs to be modified for some reason, the regulations demand that the exporter return the original certificate to the USDA before a replacement certificate will issue for a fee charged according to time spent (for Food Safety and Inspection Service ("FSIS") certificates), *see* 9 C.F.R. §§ 322.2, 350.7, 391.2, 391.3, or for a flat fee charged according to regulations (for Animal Plant and health Inspection Services ("APHIS") certificates). *See* 9 C.F.R. §§ 130.20, 130.50 156.2 – 156.7.

The USDA charges any company that wishes to obtain an export certificate a fee for creating the original certificate and another fee for creating the replacement certificate after return of the original.[4] The fees are referred to as "user fees"

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3. Petitioner misstates that the certification process is neither a regulatory requirement nor a profit-making endeavor for the government. Pet. at 5. Although it is true that no manufacturer of animal products must ship those products internationally, (they could choose to sell all their meat within the United States borders, for example); and that not all countries require a USDA export certificate (although most do); once a person decides to undertake such international transactions with countries that require export certificates, regulatory requirements then govern the certification process.

4. Petitioner misstates that the FSIS does not normally charge for issuing an export certificate, either original or replacement, related to inspection of meat products. Pet. at 5. The USDA charges a fee to ConAgra for every export certificate it issues, whether original or

(Cont'd)

because the government charges the user, not the taxpayer, for the processing time it takes a USDA veterinarian to review, prepare, and execute export certificates for foreign commerce.

The Agricultural Marketing Act of 1946 confers on the FSIS the authority to collect fees for voluntary inspection services relating to export certificates for animal meats, which commands "assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered." 7 U.S.C. § 1622(h). Federal regulations set forth payment provisions for voluntary inspection services in absolute terms: "Fees and charges for service under the regulations in this part *shall be paid* by the applicant for the service in accordance with this section, and, if required by the Administrator, the fees and charges *shall be paid* in advance." 9 C.F.R. § 350.7(a) (emphasis added).

The Food, Agriculture, Conservation and Trade Act of 1990 specifically authorizes the Secretary of Agriculture to prescribe and collect user fees for export certification services related to animal products such as hides. 21 U.S.C. § 136a. The Act further provides: "Any person for whom an activity related to the importation, entry, or exportation of an animal, article, or means of conveyance or relating to veterinary diagnostics, is performed pursuant to the section, *shall be*

(Cont'd)

replacement. ConAgra may be confused as it relates to health inspection certificates that are required by federal law for the safety of our citizens related to meats sold within the United States. However, these are not export certificates. Every export certificate issued is charged to the person requesting the same, and this case deals only with international export certificates, not certificates of wholesomeness that are statutorily required under federal law for meat sold within the United States.

liable for payment of fees assessed." 21 U.S.C. § 136a(c)(4) (emphasis added). APHIS user fees charge for services that benefit the exporter rather than the general public. Exportation activities require the exporter to pay APHIS fees for the cost of providing the services. These services are not covered by appropriated funding, and the fees allow APHIS to fund the cost of providing the goods and services. *See* 65 FR 51997 (8/28/00) (APHIS explanation of its user fees). Federal regulations set the fees associated with issuance of APHIS certificates. *See* 9 C.F.R. § 130.20(a). A fee *must* be paid for *each* export health certificate. *Ibid.* (emphasis added).

When ConAgra applies for, and receives, an original export certificate from the USDA, ConAgra places itself under the statutory framework that controls and strictly regulates the terms and conditions of possession and presentment of those certificates and any required replacement certificates, including regulations that prescribe mandatory "user fees" to be paid to the USDA.

The subject of this reverse false claims action arises from ConAgra's actions in obtaining original USDA export certificates and then determining later that it needed replacement certificates. This need occurred when ConAgra decided to ship the animal products to a different buyer; or to another country; or for a myriad of other peculiar and distinct business reasons that rendered the original export certificate useless. Although there were instances when ConAgra would follow the law and return the original export certificate to the USDA; complete an application to obtain a valid replacement export certificate; and pay to USDA the fee for the replacement export certificate, this case is about those other instances when ConAgra chose not to follow the

law, but rather unilaterally made changes to the original export certificate.[5] ConAgra would take an original USDA export certificate and use white-out, erasers, tape over, and other means to remove information from the original government document, and then retype information in its place, or in some instances, add information where no information previously existed.[6] ConAgra also changed the grade of beef from a lower grade to a higher grade;[7] changed

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5. Petitioner misstates the regulations in arguing that it has no obligation to pay a user fee unless ConAgra seeks and the government issues the export certificates. Pet. at 3.

6. Petitioner misstates the instances in which ConAgra employees would change information on export certificates, and misstates that it had permission from the USDA to do so. Pet. at 6. ConAgra alleges that it made what it likes to term "corrections" to USDA export certificates because it had permission, past or present, from USDA officials. This is not correct in two aspects: first, there are few (if any) documented instances where ConAgra had permission from an USDA official to make its own changes to any export certificate; and secondly, ConAgra would make significant alterations to the information contained in the export certificate, not just "minor corrections" as alleged by ConAgra. Further, Bahrani does not admit that "all changes were made to make the certificates correct and accurate," as he has not yet reviewed all of the altered documents that have been uncovered in this case to date.

7. Petitioner misstates that the USDA investigated ConAgra in 1999, "extensively" about the alleged wrongdoing and never imposed fines, penalties, or sanctions, and argues that this lack of action by the USDA supports ConAgra's position that "the USDA itself found no wrongdoing." Pet. at 20. The USDA investigated an allegation that certain export certificates for ConAgra's international shipments to South Korea had the grade of meat upgraded. Period.

(Cont'd)

which ships were carrying the cargo; changed the voyage sea routes of the shipment; changed the dates of animal slaughter and processing to make the dates more current; changed the weight or amount of the shipment; changed the destination of the export; and changed virtually every other type of alteration to information that should be contained in the original USDA export certificates.

The government recognizes ConAgra's "obligation to pay." In the court of appeals, in its Amicus Brief, the government described: "The USDA's current practice, *supported by the Code of Federal Regulations*, is to require a replacement export certificate – and an additional fee – if the issued export certificate needs to be modified." Amicus Br. at 5 (emphasis added). The substance and requirements of the applicable regulations, which currently mandate replacement export certificates and the payment of additional "user fees," have remained constant for all relevant time periods covered by this lawsuit.

(Cont'd)

The South Korean government discovered alterations in grades of meat on the certificates. When the USDA investigated this limited issue, ConAgra blamed the South Korean importers for altering the certificates. Thus, the USDA took no action against ConAgra based on its mistaken belief that a third party tampered with ConAgra's documents. The case before this Court includes alterations, not just of the grades of beef to South Korean exports, but alterations to various elements of export certificates to numerous foreign governments and for products including beef, pork, poultry, and cow hides. Thus, the investigation was neither "extensive" (it dealt with a very limited aspect of ConAgra's export market, South Korea), nor did the USDA find "no wrongdoing" (ConAgra placed the blame on others), and it is imprudent for ConAgra to speculate that the USDA found no wrongdoing.

Agency directives also provide compelling evidence supporting the Tenth Circuit's finding of an "obligation to pay" in this case. *See* FSIS Directive 5110.1, 9000.1. The Court grants "substantial deference" to an agency's interpretation of its own regulations and policies. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Further, "the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Ibid.* (quotation omitted) Each USDA Directive is supported by Code of Federal Regulations citations, and each Directive provides valuable insight as to how the USDA interprets and implements the laws it administers. The Tenth Circuit exercised this proper deference.

Each time ConAgra altered an original USDA export certificate, it bypassed the export certification process that regulates the correction and replacement of these certificates. By impermissibly altering and using the documents ConAgra avoided paying fees to the government. ConAgra obtained the benefit of "official" government documents that allowed it to conduct business with foreign nations without paying for this service.

ConAgra's conduct not only avoided its obligation to pay user fees, but it also jeopardized the integrity of the United States export process. "The export certification process serves to instill confidence in U.S. meat and poultry products throughout the world." FSIS Directive 9000.1. Official export certificates are representations by the government that the exported product meets certain standards and criteria imposed by foreign nations. ConAgra's avoidance of its regulatory obligations risks undermining the confidence of foreign nations in these official representations.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S FACT-BOUND OBLIGATION ARGUMENT DOES NOT MERIT REVIEW

At the core, ConAgra's petition challenging the Tenth Circuit's narrowly-tailored opinion holding that the replacement export certificate fees at issue constitute an obligation owed to the United States takes issue only with the application of a properly stated rule of law to the particular facts of this case. This is not a basis for this Court's review. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

The reverse false claims provision of the FCA clearly encompasses the types of regulatory fee avoidance undertaken by ConAgra as fitting within the meaning of the term "obligation." *See* 31 U.S.C. § 3729(a)(7). When ConAgra employees discovered inaccuracies in export certificates they were required to obtain replacement export certificates rather than simply changing or altering the existing certificates and avoiding an obligation to pay the attendant fees for those new certificates. The Tenth Circuit correctly analyzed precedent from other circuits in applying the reverse false claims obligation requirement and concluded that ConAgra had avoided its obligations to pay. ConAgra's petition is simply a disagreement with the result of that fact-bound analysis, which is not a basis for this Court's review.

A. The Tenth Circuit Correctly Applied Settled Principles Of Law To The Particular Facts Of This Case

While the FCA does not define the term obligation, legislative history supports a broad interpretation. In *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968), this Court held that the FCA "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." The Senate Report accompanying the 1986 FCA Amendments "strongly endorse[d] this interpretation" specifically in connection with the addition of Section 3729(a)(7). S. Rep. 99-345, at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284.

Accordingly, the "obligation to pay" can find its origin in a number of ways. The obligation to pay can be created by contract, statute, regulation, judgment, or acknowledgment of indebtedness. *See, e.g., United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236-38 (11th Cir. 1999) (finding violation of the reverse false claims provisions of the FCA for breach of contractual obligation). A defendant's obligation must be "a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness," rather than a "potential liability" or fine or penalty. *United States v. Q Int'l Courier, Inc.*, 131 F.3d 770, 773 (8th Cir. 1997); *see also Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1048 (10th Cir. 2004) ("Pursuant to § 3729(a)(7), Relators are required to allege that [defendant] had 'an existing, legal obligation to pay or transmit money or property to the Government' and that [defendant] submitted false statements or records to conceal, avoid, or decrease that obligation.") (quotation marks omitted). The Tenth Circuit's application of the "obligation

to pay" provision is not only consistent with the language of the FCA, but is also consistent with both the legislative history and circuit court opinions interpreting the same language.

B. A Writ of Certiorari Is Not Appropriate At This Stage Of The Litigation Because ConAgra Seeks Review Of The Reversal Of A Summary Judgment Ruling

The District Court granted summary judgment for ConAgra, and the Tenth Circuit reversed the summary judgment and remanded the case to the District Court for further proceedings.[8] The case is still in the pretrial stage and could possibly be determined on its merits in a way that makes review by this Court, at this time, unnecessary.

Even if the Court were interested in addressing whether and under what circumstances the avoidance of voluntary user fees for replacement export certificates constitutes an obligation under the reverse false claims statute, the pretrial posture of this case would make it a poor vehicle for deciding such issues. Because the case was appealed from a Rule 56 summary judgment, before the close of discovery, the factual nature of the replacement export certificates avoided by ConAgra remains undeveloped in full. Proceedings on remand could yet obviate the need to address the obligation issue altogether if respondent does not succeed in proving this case. More importantly, even positing (as respondent does) that respondent will be able to prove the allegations of

8. Petitioner misstates the value of this case (Pet. at 19) because the precise value of the case has not been determined and will be subject to further factual development pursuant to the Tenth Circuit's decision.

his complaint, a factual record disclosing exactly what the obligations were, and how they were avoided by petitioner in the circumstances of this case, would contribute to a more informed decision on the application of the reverse false claims obligation in a concrete factual setting. This case is scheduled for trial beginning June 2, 2008, and is, therefore, an obvious candidate for application of this Court's normal practice of not granting certiorari to review an [in effect] interlocutory ruling of a federal court of appeals. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). Without more development in the court below, the Tenth Circuit's ruling in this case remains too preliminary for review.

C. No Important Question Of Federal Law Has Been Decided In A Way That Conflicts With Decisions Of This Court

In its petition, ConAgra fails to cite a single opinion of this Court. There is no allegation that the Tenth Circuit's opinion in any way conflicts with relevant decisions of this Court. There could be no such allegation, because the opinion does not conflict with any decision of this Court. Thus, the Tenth Circuit's opinion is not a fitting candidate for this Court's review.

D. The Unique USDA Regulations And Facts At Issue Provide No Future Precedential Value, And, Thus Do Not Provide The Appropriate Vehicle To Determine The Question Presented By ConAgra

This case involves application of a very unique set of facts (USDA regulations regarding issuance of replacement export certificates and imposition of user fees), and a review by this Court will unlikely provide precedential value for any other FCA case. As will be shown below, every circuit cited by ConAgra agrees with the Tenth Circuit's holding that governmental regulations and statutes may form the basis for an "obligation to pay" under the FCA. The courts of appeal agree on the scope of the term "obligation," and apply that same legal standard to the specific regulations before them.

Because the Tenth Circuit aligns with the other circuits in determining that governmental regulations can form the basis of a valid FCA obligation, all that remains for this Court to review is the specific USDA regulations concerning export of animal products to decide if this Court agrees with the Tenth Circuit in applying the point of law to the specific facts of this case. However, the role of this Court has traditionally not been to correct perceived errors of application of facts to law, but to review the point of law being applied by the circuits to assure uniformity.

For these reasons, if this Court were to find that the Tenth Circuit comports with the Sixth and Eighth Circuits in finding that agency regulations can form the basis for a valid "obligation," but nonetheless decides to disagree with the Tenth Circuit's conclusion that these particular USDA export

certificate regulations are sufficient to create an obligation to pay a fee, then the precedential value of this Court's opinion would simply be to guide those few future courts (if any were ever faced with these regulations again), that the export certification regulations at issue are insufficient to create a present obligation to pay a fee to the USDA.

ConAgra frames the Question Presented as broadly as possible, in an attempt to draw this Court into making an "error correction." Among other examples, ConAgra argues that, if the Tenth Circuit's logic remains, persons who alter their government-issued passports by changing the expiration date, then presenting the passport to a customs official, could be found in violation of the reverse false claims provision of the FCA. This argument favors respondent's position. This argument also demonstrates that certainly more appropriate cases for review of such a broad inquiry as ConAgra's Question Presented would involve much more common licensing or certification issues or some other regulated activity that could be more readily and universally applied in other cases.

Even if this Court were to find the Question Presented interesting for review, certiorari should be denied in this case because it does not present the proper vehicle for determining the Question Presented. Surely, if as alleged by ConAgra, "the Tenth Circuit's decision creates a conflict among the circuits and tremendous uncertainty and confusion as to what constitutes an 'obligation' under the reverse false claims provision of the FCA," (Pet. at 23), then more suitable vehicles will soon come before this Court, albeit with much more commonly and broadly applicable regulated activities than those presented by the exclusive world of multi-billion dollar corporations engaged in international exports of animal products.

ConAgra's assertion that the issue presented will yield "harsh sanctions" in a "wide variety of circumstances" and will significantly expand the FCA's application" for "fee-based permits or certificates required by a multitude of federal agencies [that] are numerous and diverse" (Pet. at 15) rings hollow. This is exactly what the reverse false claims provision of the FCA seeks to encompass. In the 20-plus years since the enactment of the reverse false claims provision, ConAgra can point to no directly apposite case and only point to inapposite federal appellate decisions that present even vaguely similar issues in its attempt to support its position.

E. Jurists Who Have Considered The Legal Point Presented By This Case Agree — A Regulation Can Form The Basis Of An Enforceable "Obligation" Under The FCA

The District Court judge who granted summary judgment for ConAgra did so, not based on a different understanding of the legal point at issue, but based on a different reading of the USDA regulations applicable to the facts of this specific case. Pet. at App. 49. He applied the correct point of law — that a governmental regulation *could* be the basis of an "obligation" under the False Claims Act — but under his reading of the applicable USDA regulations, determined that those specific export regulations did not require a person to pay a fee to the government. *Ibid.*

The unanimous Tenth Circuit panel also agreed with the point of law at issue, but read the regulations differently from the District Court judge and determined that those specific export regulations at issue did indeed require a person to pay a fee to the government. The Tenth Circuit concluded that a person could not avoid this obligation through

unilateral action outside the regulatory process. The full Tenth Circuit Court then denied ConAgra's *en banc* petition, which set forth the same arguments presented in this petition.

For those exporters who choose to export animal meats and animal products, the obligation to obtain a new or replacement export certificate is borne of necessity and prescribed by the regulatory process. Should an exporter desire to obtain a new, corrected export certificate, it has but one option – follow the prescribed regulatory process and pay the required fees.

The existence of a specific regulatory process for obtaining certificates coupled with the strong prohibition against alterations of existing certificates leads to the undeniable conclusion that new, corrected certificates *must* be obtained through the established process. This logical conclusion has the benefit of legal support through statutory construction principles. "The rule against superfluities complements the principle that courts are to interpret the words of a statute in context." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citing 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181-186 (rev. 6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ." (footnotes omitted)). Concluding that exporters are not obligated to obtain a new certificate through the prescribed process renders superfluous the specific statutory mandate prohibiting the alteration and use of altered certificates. Additionally, with respect to FSIS export certificates in particular, ConAgra's reasoning would render superfluous the regulations and directives relating to replacement export certificates, which the Tenth Circuit already found supported ConAgra's obligation to pay.

Applied to the present case, this statutory construction rule supports a conclusion that by specifying a process to be followed the government intended that no other methods of obtaining official export certificates would be allowed. Moreover, the express prohibition against altering a certificate is determinative evidence that the prescribed regulatory process was intended as the only means to correct an export certificate that has already been issued and signed by the certifying official.

Precedent established by the Sixth Circuit, the Eighth Circuit, and now by the Tenth Circuit in this case, all applies the same point of law. The consistent point of law established by all three Circuits, and other FCA cases, provides that governmental regulations may create an enforceable "obligation to pay" money under the FCA.

II. There Is No Circuit Conflict

Under this Court's Rule 10, the Tenth Circuit's application of the "properly stated rule of law" of the reverse false claims provision to the particular allegations of the *qui tam* relator's complaint is not a question worthy of a grant of certiorari. Petitioner's contrary claim that this fact-bound ruling merits review by this Court rests principally on the contention that it conflicts with holdings of the Sixth and Eighth Circuits. Pet. at 20-23. Review of the decisions ConAgra cites, however, reveals that the "conflict" is illusory. The circuits all agree on the same point of law, that governmental regulations and statutes can create enforceable obligations under the FCA. The Tenth Circuit applied this same legal theory of obligation, extensively analyzed the USDA regulations at issue, and concluded that those regulations were sufficient to create an obligation in certain instances for ConAgra to pay user fees under the unique and specific facts of this case.

As the Court has stated, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (dismissing writ as improvidently granted). This is no such case.

A. There Is No Conflict Between The Tenth Circuit's Decision And Those Of The Sixth Or Eighth Circuits Regarding The Basic Point Of Law

The Tenth Circuit's decision directly comports with the two cases ConAgra alleges it does not, *American Textile Manufacturers Institute v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999) ("*ATMI*") and *United States v. Q International Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997). The Tenth Circuit's decision properly stated the law. *See Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813 (1931) ("It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted.") (citation omitted). In fact, the Tenth Circuit thoroughly analyzed the cases that ConAgra argues create a conflict and found its decision consistent with the Sixth and Eighth Circuits and factually distinguishable from the obligations addressed by those courts:

> Although a § 3729(a)(7) "obligation" need not be for a precise amount in order to be actionable, we do agree with the district court and Conagra that the obligation must arise from a source independent of the "allegedly fraudulent acts taken to avoid it." [Citation omitted]. That conclusion comports with

> the Sixth and Eighth Circuit decisions in *American Textile Manufacturers* and *Q International*, both of which concluded on the facts before them that no obligation existed independently of the alleged false statements themselves. *See Am. Textile Mfrs.*, 190 F.3d at 738-41 (concluding that, under the statutes at issue, the defendant's obligations arose only after the defendant made false statements and "only because the government ha[d] prohibited an act"); *Q Int'l*, 131 F.3d at 773 (holding that, when the defendant engaged in the challenged practice of "ABA remail," it had no "obligation" to pay full domestic postage, even though the practice might have violated other statutes).
>
> However, unlike the district court, we view the alleged obligations at issue in *American Textile Manufacturers* and *Q International* as distinguishable from the obligation to pay fees for "in lieu of" and replacement certificates when major or significant changes are necessary. Here, it is not Conagra employees' making of corrections on the original export certificates that creates the obligation to pay the fee. Instead, that obligation arises from and independent source — from the determination that the original certificate contains a major or significant error or omission and that an "in lieu of" or replacement certificate and payment of the accompanying fee are necessary. It is the discovery that these changes are necessary that creates the obligation.

Pet. at App. 24-25. The obligation to pay fees in this case is not the same kind of contingent or potential liability discussed

in *ATMI* and *Q International*. To argue this point reflects a misunderstanding of the source of the obligation in this case. The respondent does not seek to enforce an obligation to pay that arises *because* ConAgra engaged in a prohibited practice of altering export certificates. While the statutes do set forth penalties that may apply "because the government has prohibited an act," this is not the source of respondent's claim. Respondent's *qui tam* claim arises from ConAgra's use of unilaterally-altered documents to avoid paying user fees associated with the provision of official, corrected documents pursuant to the applicable regulatory requirements.

B. The Obligation To Pay Fees In This Case Is Neither Contingent Nor A Fine Or Penalty

Relatively few courts have analyzed the meaning of the phrase "obligation to pay." Those courts that have analyzed the scope of the phrase have done so primarily in the context of cases involving penalties and fines imposed for committing some kind of wrongful act. Courts have found that the obligation must be an existing obligation to pay money or property as opposed to a contingent or potential future fine or penalty. *See, e.g., Q Int'l.*, 131 F.3d at 773; *ATMI*, 190 F.3d at 734.

Legislative history indicates that potential fines and penalties need to be distinguished from other "obligations to pay" that are enforceable under the FCA. With respect to other "obligations to pay," Congress indicated its intent that these include, not only existing claims owed at the time the false record or statement is made, but also potential claims the government could have against a defendant. *See* S. Rep. No. 99-345 at 18, 1986 U.S.C.C.A.N. at 5283 (section

3729(a)(7) applies to attempts to "defeat or reduce the amount of a claim *or potential claim* by the United States" (emphasis added)).

In amicus briefing in other cases, the government likewise supports the distinction between potential fines and penalties and other "obligations to pay." For example, in *ATMI* the government filed an amicus brief advancing the position that future fines and penalties are not sufficient obligations because they, in effect, do not exist until after the wrongful conduct has occurred. However, the government distinguished other obligations, stating:

> [T]he "reverse false claims" provision encompasses within its scope those obligations owed to the government (under statute, regulation, contract, or quasi-contract) arising from the provision of some privilege, right or benefit in return for which the recipient owes money or property.
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> * * *
>
> Accordingly, the Act applies to false statements made to avoid payment of contractual obligations [even in the absence of a judgment], or monetary obligations such as customs duties or *user fees, imposed by statute or regulation.*

ATMI, 190 F.3d at 740 (emphasis added). And, in *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648 (5th Cir. 2004), the government reemphasized the distinction between potential fines and penalties and the myriad of other obligations covered by the FCA. The government noted that the obligation to pay could arise from an obligation spelled

out by judgment, contract, statute, or regulation that was either liquidated (i.e. judgment) or unliquidated, but easily determinable (i.e. tariffs and fees). These fixed obligations are "indisputably a *sufficient* condition supporting a reverse false claims action under section 3729(a)(7)."[9] *Ibid.* at 656. Therefore, the user fees for export certificates at issue in this case are "indisputably sufficient."

ConAgra asks this Court to apply precedent historically limited to cases involving potential fines or penalties and to substantially curtail the scope of the FCA by denying that the FCA applies to any attempts to avoid payment of fees associated with voluntary government services.

ConAgra desires an interpretation of the FCA's "obligation to pay" provision based upon interpretations of the phrase "obligation to pay" made by the Eighth Circuit in *Q International*, and by the Sixth Circuit in *ATMI* stemming from government prohibitions or government discretion, yet neither apply under the operative facts and law in this case. Both *Q International* and *ATMI* addressed the narrow question of FCA liability for potential or contingent fines and penalties and were not intended to apply broadly to all obligations to pay. The Sixth and Eighth Circuits acknowledged those narrow questions. In *ATMI*, the court affirmatively stated that it would "leave for a more appropriate case the status of those obligations arising from

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9. The government also noted that the scope of the "obligation to pay" was sufficiently large to include contingent obligations arising out of a contractual or financial relationship "under which the government provides some benefit to the defendant wholly or partially *in exchange* for an expected payment or transfer of property." *Bain*, 386 F.3d at 656 (emphasis in original).

the provision of 'rights, privileges, or benefits,' and those obligations created by statute or regulation that are 'essentially contractual in nature.'" *ATMI*, 190 F.3d at 741. In *Q International* the court distinguished fines and penalties from other obligations, acknowledging its satisfaction "as a legal matter" that statutes and regulations imposing a duty to pay qualify as an "obligation" under the FCA. *Q Int'l*, 131 F.3d at 773.

An analysis of the obligation to pay in this case as contrasted with the contingent or future fines and penalties discussed in *Q International* and *ATMI* demonstrates that the holdings in *Q International* and *ATMI* do not support petitioner's argument.

The Eighth Circuit in reaching its decision noted that the government:

> must demonstrate that it was owed a specific, legal obligation at the time the alleged false statement was made, used or caused to be made or used. The obligation cannot be merely a potential liability: instead, in order to be subject to the penalties of the False Claims Act, a defendant must have had a present duty to pay money or property that was created by statute, regulation, contract, judgment, or acknowledgment of indebtedness.

Ibid. The court specifically found that the statutes cited by the government were "designed to punish one who violates the [statutes], not to create an obligation to pay postage." *Ibid.* at 774. The court stated that "had Congress wished to cover attempts to avoid potential fines or sanctions it would have used language appropriate to that end." *Ibid.* at 773.

The Sixth Circuit examined limited precedent and the legislative history of the 1986 FCA amendments, ruling that the obligation under the FCA "does not include those contingent obligations that arise only because the government has prohibited an act, or arising after the exercise of government discretion." *ATMI*, 190 F.3d at 741. The Sixth Circuit carefully limited its holding, specifically distinguishing contingent obligations imposing fines from quasi-contractual obligations created by statute or regulation. *Ibid.* at 738. The court further stated:

> Although we do not decide the matter, we think that the history of the 1986 amendments suggest that Congress may well have intended reverse false claims liability to extend to obligations created by statute or regulation, at least where the statute or regulation imposes an obligation "essentially contractual in nature," such as the imposition of the requirement that those using the Postal Service pay the appropriate rate.

Ibid. at 737-738. The Tenth Circuit correctly applied the rule of law as intended by Congress. The Tenth Circuit found existing legal obligations as set forth in *Q International* and further decided the matter left undecided by *ATMI* by holding that FCA liability extended to obligations created by statute or regulation.

In sum, neither of the two cases on which petitioner relies for the asserted conflict addresses whether a voluntary user fee established in agency regulations, but nevertheless unilaterally avoided by a defendant, constitutes an obligation under the reverse false claims provision. The facts of the present case show that the obligation to pay fees for

replacement export certificates is *not* the type of contingent obligation held by the Sixth and Eighth Circuits as insufficient under the FCA.

A similar case (ignored by ConAgra) regarding importation of agricultural products into the United States for which the defendant exporters avoided anti-dumping regulatory requirements found that the reverse false claims provision of the FCA operated to create an obligation that defendants avoided. *See United States ex rel. Huangyan Import & Export Corp. v. Nature's Farm Prods., Inc.*, 370 F.Supp.2d 993 (N.D. Cal. 2005). The *Nature's Farm* defendants evaded customs duties on their imports by falsifying their products' country of origin and argued, as does ConAgra, that this falsification did not violate the reverse false claims provision of the FCA because any obligation must preexist the false record or statement. *Ibid.* at 999 (stating that "[t]he customs duties, including anti-dumping duties, attach at the time goods (such as mushrooms) are trucked over the border from Canada [which] is *at the same time* that the alleged false statements or records, . . . were submitted to the United States Customs Service"). The court disagreed and distinguished the cases the defendant relied on, as here, *Bain*, *ATMI*, and *Q International*, stating: "Each of these cases is factually distinguishable and, more importantly, the reasoning of *Bain*, *ATMI*, and *Quick* does not support the result that the NFP defendants would have the court reach in this case." *Ibid.* The defendants' contingent obligation argument failed to persuade the court, as "[i]mportation is a contingency in the control of the importer; there is no other discretion to be found in the hands of some government official." *Ibid.* at 1000.

ConAgra's contingent obligation argument likewise fails because exportation is a contingency within ConAgra's control; there is no discretion to be found. The replacement export certificate fee at issue in this case is simply the price of exporting certain products to certain countries, and therefore, is like the anti-dumping duty in *Nature's Farm*, which "is not assessed because importation is 'wrongful'; it is simply the price of bringing certain products into the United States." *Ibid.* at 1002. "There are obligations that are certain (or nondiscretionary and readily computable) and there are fines and penalties contingent on governmental discretion, and the putative obligation in this case falls in the former category." *Ibid.* The Tenth Circuit likewise found ConAgra's putative obligation certain:

> Here, it is not Conagra employees' making of corrections on the original export certificates that creates the obligation to pay the fee. Instead, that obligation arises from an independent source—from the determination that the original certificate contains a major or significant error or omission and that an "in lieu of" or replacement certificate and payment of the accompanying fee are necessary. It is the discovery that these changes are necessary that creates the obligation.

Pet. at App. 25. ConAgra had an obligation to pay fees for replacement export certificates.

The Tenth Circuit correctly found the "obligation to pay" in this case is an obligation to pay a set fee for the provision of a governmental service, namely certification and provision of official export documents. The fees in this case do not arise because ConAgra committed a prohibited act. Furthermore, the statutes and regulatory provisions controlling the payment of

fees for export certification services are not designed to "punish one who violates the [statutes]." *See Q Int'l*, 131 F.3d at 774. The user fees are not punitive. The fees are designed to compensate the government for costs associated with providing the service to exporters. *See, e.g.*, 65 FR 51997 (8/28/00).

Reference to the regulatory process surrounding export certificates illustrates the distinction between a contingent or potential obligation as contemplated by *Q International* and *ATMI* and the obligation in this case. The statutes, regulations, and directives controlling the process *prescribe* specific fees to be charged for use of government export certification services. These include fees to be charged for obtaining replacement export certificates from FSIS and APHIS. The statutes also *proscribe* specific conduct, setting forth fines and penalties to be imposed against those who impermissibly alter or use altered export certificates. *See* 21 U.S.C. §§ 611 & 676; 7 U.S.C. § 1622(h). As contemplated by the court in *ATMI*, ConAgra's obligation to pay fines and penalties for altering official export certificates would not be an enforceable obligation under the FCA because it is contingent on a finding of wrongdoing and arises only as a result of committing a prohibited act. *See ATMI*, 190 F.3d at 741-42 (discussing how the ad valorem duty at issue in that case did not exist but for the defendant engaging in wrongful conduct). In contrast, this case encompasses an obligation because it involves ConAgra's avoidance of the prescribed fees and not ConAgra's conduct relating to proscribed alterations, a wholly separate inquiry not at issue in this case.

The obligation to pay in this case is analogous to the requirement to pay postage for the use of the postal services. In the case of postage, the user pays a fee to get a stamp that allows him to mail a letter. In the case of export certificates, the user

pays a fee to get a certificate that allows him (by satisfying the receiving country) to export products. A person does not incur liability for postage until he decides use the mail. Nevertheless, the obligation to obtain the stamp and pay the requisite postage exists because the person chose to use the mail. Likewise, in this case, ConAgra did not incur liability for the price of a replacement export certificate until it decided that information needed to be changed on the original export certificate. Thus, the obligation to obtain the certificate and pay the fee exists because ConAgra chose to export its product to a country that required an official United States export certificate. In neither case is the fee imposed contingent or as a consequence of the user engaging in a prohibited act. It is permissible to mail letters and it is permissible to export animal meats and products. In both cases the fees preexist any act on the part of the user of the service. It is, however, impermissible to avoid the obligations associated with either situation.

Fees such as those at issue in this case fundamentally differ from potential fines and penalties and cannot be casually lumped into the same category without directly conflicting with expansive statutory language and clear pronouncements of legislative intent. No direct conflict exists between this case and the *Q International* and *ATMI* cases, and no far-reaching expansion of reverse false claims application results from the Tenth Circuit's consistent and correct decision.

The obligation to pay in this case exists in fixed amounts prior to and independent of any exercise of discretion by any government employee. An FSIS certifying official has only this one opportunity, before the certificate is signed, to approve minor alterations after which any discretion he may have had to approve

changes is forever extinguished.[10] It is, therefore, different than the contingent obligation discussed in *ATMI*. FSIS regulations dictate that fees and charges "*shall be paid* by the applicant . . ." 9 C.F.R. § 350.7(a). APHIS regulations similarly state: "A fee *must* be paid for *each* export health certificate." 9 C.F.R. § 130.20(a) (emphasis added). The statutes, regulations, and directives indicate: "*[a]ll costs* for these voluntary inspection and certification services are recoverable." FSIS Directive 5110.1 ¶ VI.B.1.b (emphasis added). In fact, the government specifically disavows any discretion with respect to the fees associated with voluntary export services. In adopting its fee schedule, the FSIS has recognized that "[e]xecutive branch departments and agencies are *required* by OMB Circular No. A-25, User Charges, to recover the total cost of carrying out any reimbursable activity." 54 FR 6388 (2/10/89).

For the reasons stated above, both the *Q International* and the *ATMI* cases differ from the facts of this case and do not conflict with it. One case dealt with regulations that did not place an obligation on the defendant to do anything, but instead merely relieved the government of its obligation to deliver mail; and the other case involved potential future fines and penalties that were too speculative and uncertain to create a present obligation to pay the government anything at the time the defendant created the false records. The Tenth Circuit applied the same legal standard to determine "obligations" under the FCA as those applied by the Sixth Circuit and the Eighth Circuit. ConAgra merely alleges an illusory conflict.

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10. Each certificate has a unique serial number and is issued in triplicate form and copies of the certificates go to different persons. 9 C.F.R. § 322.2(b)-(e). If the FSIS inspector were allowed to initial changes *after* the original had been signed, it would create an untenable situation where certificates bearing the same serial number contained different information calling into question the authenticity or validity of each copy.

CONCLUSION

This case proceeds, hotly contested, in the District Court, and a jury trial has been scheduled for June 2, 2008. Undoubtedly, other appellate points will arise over the course of the next year or two or three, and ConAgra will likely file another Petition for Writ of Certiorari in the future, after both the trial and another appeal to the Tenth Circuit have been completed. Thus, the Court should not entertain what amounts to an interlocutory writ while the parties remain embroiled in active litigation.

Despite petitioner's efforts, no issue worthy of this Court's review can be teased out of this unusual case. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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